

CHAPTER 7

THE FOUNDATIONS OF JUSTICE AND HUMAN RIGHTS IN EARLY LEGAL TEXTS AND THOUGHT

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1. INTRODUCTION

IDEAS of justice and human rights possess a long and rich history. They did not originate exclusively in any single geographical region of the world, any single country, any single century, any single manner, or even any single political form of government or legal system. They emerged instead in many ways from many places, societies, religious and secular traditions, cultures, and different means of expression, over thousands of years. Indeed, they took millennia to evolve, since they always depended upon their specific historical context and what was possible in the face of established tradition and often determined resistance, at the time. Sometimes these ideas came from solemn reflection and quiet contemplation, based upon religious belief or philosophical opinion. On other occasions, they emerged from outrage over a sense of injustice or the pain of violent abuse, brutal atrocities, or war and revolution. Sometimes they took the form of visions or thoughts about the future and how human dignity might be protected. Other times, these ideas were

transformed into actual legal texts, designed in some measure to serve justice and to guarantee rights.¹

Although it is necessary to guard against the shallow and unhistorical view that all societies somehow have always subscribed to the same basic beliefs, it is also essential to recognize that justice and the moral worth of human beings are values that no single civilization, or location, or people, or nation, or time, can claim as uniquely its own. The reason for this is that these subjects raise age-old and universal questions about the meaning of justice and the purpose of the rule of law, the relationship between duties and rights, and what it means to be truly human. Indeed, as one authoritative study insightfully concludes: 'The struggle for human rights is as old as [world] history itself, because it concerns the need to protect the individual against the abuse of power by the monarch, the tyrant, or the state.'²

2. ANCIENT NEAR AND MIDDLE EAST

The long-standing and widespread interest in justice is evident from the very beginnings of civilization itself. Once nomadic tribal peoples began to settle in permanent organized societies, they began to create rules to regulate and govern their behaviour that might enable them to avoid complete anarchy and the arbitrary abuse of power. The development of writing permitted such rules to be written down and recorded as laws. Archeologists have discovered fragments of the earliest legal documents and collections from ancient Egypt and Mesopotamia. These include the Sumerian Code of Ur-Nammu (c 2100–2050 BCE), the codex of Lipit-Ishtar (c 1930 BCE), and the Akkadian Laws of Eshnunna (c 1770 BCE).³

Among these early codes, one of the most significant and remarkable contributions to the historical evolution of law came from King Hammurabi (c 1792–1750 BCE), who ruled ancient Babylon. His famous Code of Hammurabi is the oldest set of complete laws known to exist in the world. Some laws are written in cuneiform script impressed on baked clay tablets, while the most famous ones are carved on solid stone steles designed for public display. One copy introduces the text with an image depicting Hammurabi receiving these laws directly from the sun god, a

¹ For a comprehensive discussion, see Paul Gordon Lauren (ed), *The Evolution of International Human Rights: Visions Seen* (3rd edn, U Pennsylvania Press 2011).

² AH Robertson and JG Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (Manchester UP 1996) 9.

³ The most detailed treatment of these legal codes can be found in Raymond Westbrook (ed), *A History of Ancient Near Eastern Law* (Brill 2003).

deity of the time that was most often associated with justice. In fact, Hammurabi himself described his code as representing 'the laws of Justice'. 'Let the oppressed', he announced, 'come into the presence of my statute.'⁴ The text itself explicitly speaks of his desire 'to further the well-being of mankind' by creating protections 'so that the strong should not harm the weak'.⁵

The Code of Hammurabi, written in orderly groups of columns and paragraphs, contains nearly 300 separate provisions of commercial, criminal, and civil law. These provisions cover contracts, judicial procedures, penalties, or punishments, progressively scaled to the nature of crimes, family relationships, inheritance, and certain aspects of what we today call human rights. To illustrate, the code presents some of the earliest examples of the right to freedom of speech, the presumption of innocence, the right to present evidence, and the right to a fair trial by judges. To reinforce the rule of law and maintain the integrity of the judiciary, judges were held accountable according to a strict code of justice:

If a judge renders a judgment, gives a verdict, or deposits a sealed opinion, after which he reverses his judgment, they shall charge and convict that judge...and he shall give twelve-fold the claim of that judgment; moreover, they shall unseat him from his judgment in the assembly, and he shall never again sit in judgment with the judges.⁶

The Code of Hammurabi also provides certain protections for all classes in Babylonian society, including women, widows, orphans, the poor, and even slaves. Perhaps its most significant contribution can be found in its establishment of one particularly critical principle of the rule of law: some laws are so fundamental that they apply to everyone, even the king.

The requirement that all persons obey the law raised a foundational and enduring issue for human rights. That is, it revealed the existence of a direct connection between duties and rights. Early texts were initially less interested in the claims of individuals against governments or others than in the ways to order life within a society so as to protect the worth of its members. Everyone therefore had duties to others; however, if these remained unperformed, then others had a right to claim them.

The form and function of the 'Law of Moses', or Mosaic Law, in the kingdoms of ancient Israel and Judah enhanced these evolving ancient Near and Middle East legal requirements about duties and responsibilities. This law reflected experiences in Egypt and Mesopotamia, and it displayed many similarities with developments

⁴ Quoted in Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (UN Intellectual History Project 2008) 12.

⁵ 'Laws of Hammurabi', as cited in Martha Roth, *Law Collections from Mesopotamia and Asia Minor* (2nd edn, Scholars Press 1997) 76. See also LW King (tr), 'Code of Hammurabi' (*The Avalon Project*) <<http://avalon.law.yale.edu/ancient/hamframe.asp>> accessed 14 February 2013; and GR Driver and John C Miles (eds), *The Babylonian Laws* (Wipf & Stock 2007). ⁶ Roth (n 5) 82.

among those neighbours, with whom they shared many customs, antecedents, and conditions. The singular exception, of course, is that Mosaic Law referred to a monotheistic deity, rather than just a secular ruler or society, as the Torah (which the Greeks translated as *nomos* or 'Law') recorded throughout the books of Exodus, Leviticus, Numbers, and Deuteronomy. Although disputes exist over precisely how this body of law and its set of teachings and instructions evolved, as well as over when it was composed or compiled, most modern scholars believe that Mosaic Law took its final, canonical form sometime between the Babylonian Exile (c 600 BCE) and the early Persian period (c 400 BCE). The law contains provisions regarding relationships to God and relationships to other people that range over many subjects, from moral and social issues to ceremonial details about Jewish feasts, offerings, and purity.⁷

Provisions in Mosaic Law that address what we would now describe as early conceptions of human rights are explicit about the necessity of fulfilling responsibilities toward others under the law (including six of the Ten Commandments) and of applying rules of justice to individuals both friend and stranger, free and slave, man and woman, young and old, rich and poor, and healthy and disabled.⁸ They speak of reciprocal duties and rights, the sanctity of life, compassion for those who suffer, mercy, economic and social justice, release from bondage, the rights of employers and employees, protection for widows and children, and the rights of foreigners in one's own land. The injunctions are clear: 'You shall not oppress... You shall do no injustice... You shall love your neighbor as yourself.'⁹ These written laws, along with their subsequent interpretations (which took the form of oral laws), came to be considered supreme over all other sources of authority, including the king and his officials, with instructions to disregard government decrees if they were contrary to the letter and the spirit of the law. Thus, when abuses occurred, prophets spoke out and challenged their own leaders—as Isaiah forcefully did with his charge 'to loose the bonds of wickedness, to undo the tongs of the yoke, to let the oppressed go free... to share your bread with the hungry, and to bring the homeless poor into your house', and thereby 'bring justice to the nations'.¹⁰

Other developments occurred to the east. Cyrus the Great (c 580–529 BCE), the founder of the vast Persian Empire that spread from the shores of the Mediterranean

⁷ See and Raymond Westbrook, 'Biblical and Cuneiform Law Codes' (1985) 92 *Revue Biblique* 247; Joseph Blenkinsopp, *The Pentateuch: An Introduction to the First Five Books of the Bible* (Yale UP 2000); Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Harvard Law School 2003); Douglas A Knight, *Law, Power, and Justice in Ancient Israel* (Westminster John Knox Press 2011); Bernard M Levinson, *The Right Chord: Studies in Biblical Law and Interpretation* (Eisenbrauns 2011).

⁸ See Milton R Konvitz (ed), *Judaism and Human Rights* (2nd edn, Transaction 2001); Rabbis for Human Rights, 'Home' <<http://rhr.org.il/eng/>> accessed 14 February 2013.

⁹ Leviticus 9:13, 15, 18. ¹⁰ Isaiah 58:6–7; 42:1. See also the books of Amos and Micah.

Sea to the Indus River, earned his title as 'The Lawgiver' by promulgating what is known as the Charter of Cyrus. The Charter of Cyrus is written in Akkadian cuneiform script, inscribed on two fragments of a small, barrel-shaped clay cylinder found in the ruins of ancient Babylon. The incomplete text begins by describing how Cyrus entered the city not as a conqueror, but as a liberator, replacing a ruling tyrant who had imposed 'a yoke without relief' upon his subjects.¹¹ In keeping with a long-standing Mesopotamian tradition whereby new rulers began their reigns by announcing changes, it goes on to explain that he instituted reforms, granted certain rights, released captives, abolished forced labour, and 'shepherded in justice'.¹² Biblical accounts credit Cyrus with freeing Jews from their exile in Babylon and allowing them to return to their homeland, though the precise translation and meaning of portions of the text remain in dispute.¹³ Nevertheless, there are those who interpret particular passages as providing early support for religious toleration, freedom of movement, racial and linguistic equality, and several economic and social rights. Indeed, some have even described it as 'the first human rights charter in history'.¹⁴

The laws described thus far all relied on the power of the ruler not only to promulgate them, but also to enforce them; but power has different sources of legitimacy. In some instances, especially in religious communities, commandments or instructions often are considered to have the force of law when governing behaviour.¹⁵ Jesus of Nazareth (c 6 BCE–30 CE), for example, told his followers to live lives of love, justice, peace, and compassion. He commanded those who would follow him to be responsible for the well-being of others, to clothe the naked, to heal the sick, to feed the hungry, to welcome the stranger, to provide hope to the hopeless, and to care for the poor and the oppressed of the world. In this regard, Jesus stressed

¹¹ Quoted in Lawrence H Schiffman, *Texts and Traditions: A Source Reader for the Study of Second Temple and Rabbinic Judaism* (KTAV Publishing 1998) 71.

¹² Irving Finkel (tr), 'Translation of the Text on the Cyrus Cylinder' (*The British Museum*) <http://www.britishmuseum.org/explore/highlights/articles/c/cyrus_cylinder_-_translation.aspx> accessed 15 February 2013.

¹³ See Bill T Arnold and Piotr Michalowski, 'Achaemenid Period Historical Texts Concerning Mesopotamia' in Mark W Chavalas (ed), *The Ancient Near East: Historical Sources in Translation* (Wiley-Blackwell 2006) 426–30; Jona Lendering, 'Cyrus Cylinder' (*Livius*, 28 January 2007) <http://www.livius.org/ct-cz/cyrus_1/cyrus_cylinder.html> accessed 14 February 2013.

¹⁴ See Kaveh Farrokh, *Shadows in the Desert: Ancient Persia at War* (Osprey Publishers 2007) 44; Robertson and Merrills (n 2) 7; Network of Iranian American Society, 'Cyrus Cylinder' <<http://www.niasnet.org/iran-history/artifacts-historical-places-of-iran/cyruscylinder>> accessed 14 February 2013; FarsiNet, 'Cyrus Charter of Human Rights Cylinder' <<http://www.farsinet.com/cyrus>> accessed 14 February 2013; Shirin Ebadi, 'In the Name of the God of Creation and Wisdom' (Nobel Lecture, Oslo, 10 December 2003) <http://www.nobelprize.org/nobel_prizes/peace/laureates/2003/ebadi-lecture-e.html> accessed 15 February 2013.

¹⁵ See the chapter on the religious foundations of human rights by John Witte and M Christian Green in this *Handbook*; Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (U California Press 2008).

the critical importance of loving one's neighbour as one's self and centred what is perhaps his most famous and profound parable about the Good Samaritan around this principle. His disciples and those who followed him took this message to heart, as the apostle Paul's admonition to break down ethnic, class, and gender divisions by recognizing that 'there is neither Jew nor Greek, nor slave nor free, nor man or woman, but we are all one'¹⁶ reveals. He concluded directly: 'For the entire law is fulfilled in keeping this one command: "Love your neighbor as yourself".'¹⁷ At the time and long thereafter, these tenets generally remained expressions of ideals, rather than descriptions of reality, but many of them would join with those tenets of other religious faiths and inspire many human rights activists, while eventually finding their way into provisions of international human rights law.

The tenets of Islam, pronounced 500 years later and revealed in the writings of the prophet Muhammad (c 570–632 CE), also stress the responsibility or duty (*fard*) to care for the well-being of others. There is a command to protect the weakest members of society and to practise charity. The Qur'an speaks to social justice, the sanctity of life, personal safety, mercy, compassion, and respect for all human beings, rooted in the obligations that believers owe to Allah, or God. Moreover, since the Prophet Muhammad also possessed secular power as a government administrator, judge, and statesman, Islam quickly recognized a connection between religious belief and the law of a political community. In a society riven with class and tribal distinctions and the tyranny of vested interests, the Constitution of Medina, written to govern the first Islamic state, addressed matters of freedom and injustices born of special privilege, created a judicial system, and provided certain protections for individuals—including provisions respecting religious toleration. The text establishes that, 'Jews [and later Christians] who attach themselves to our commonwealth shall be protected... [T]hey shall have an equal right with our own people... and shall practice their religion as freely as the Muslims', thereby convincing some observers to describe it as 'the first charter of freedom of conscience in human history'.¹⁸ These early beginnings, in turn, set the stage for the gradual evolution of Islamic jurisprudence and what is known as Sharia law, governing aspects of religious, civil, political, constitutional, and procedural law, based not upon formally codified statutes but upon certain Muslim legal scholars' various, and often differing, interpretations of the Qur'an and Muhammad's life and teachings.¹⁹

¹⁶ Galatians 3:28. ¹⁷ Galatians 5:14.

¹⁸ Huston Smith, *The Religions of Man* (Harper & Row 1958) 249. See Mahmood Monshipouri, 'Islamic Thinking and the Internationalization of Human Rights' (1994) 84 *Muslim World* 217; Ann Elizabeth Mayer, *Islam and Human Rights* (Westview 2012).

¹⁹ See Wael B Hallaq, *The Origins and Evolution of Islamic Law* (CUP 2005).

3. ANCIENT CHINA

Contributions to ideas about justice and what would become human rights discourse also came from Asia, where the emphasis was placed on the broader ethical principles of protecting others by means of practising duty and virtue, rather than on formal laws, legal codes, or judicial procedures. At approximately the same time as the emergence of Buddhism, for example, the ancient Chinese philosopher and sage Kong Qiu (551–479 BCE), known as Confucius, stressed the importance of responsible behaviour, based not on fear of legal punishments, but rather on a desire to behave toward others to the best of human capacity, in the form of goodness, benevolence, and what he called human-heartedness. Toward this end, he emphasized the duty of doing no harm, respecting the intrinsic worth and 'moral force' of all people, practising tolerance, having laws that service justice, and acknowledging a common humanity throughout the world and the fact that 'within the four seas, all men are brothers'.²⁰ He spoke out strongly against oppressive governments that maintained power by exploitation and by the coercion of armed force. When he was asked whether there existed a single saying or principle that one could act on all day and every day, he famously answered: 'What you do not want others to do to you, do not do to others.'²¹

Other Chinese philosophers further developed many of these ideas. One of them, Mo Tzu (c 470–391 BCE), founded the Mohist school of moral philosophy. Writing at a time of incessant warfare, violence, and widespread abuse, he condemned acts that were harmful to others, rigid divisions in society that treated people differently, and any situation in which 'the strong oppressed the weak'. In contrast, he urged self-sacrifice, the establishment of uniform moral standards, fulfillment of responsibilities for the well-being of others, and respect for all—not only those confined to one's own family or clan, but, in his words, 'universally throughout the world'.²² The Confucius sage Meng Zi (372–289 BCE), known as Mencius, went on to insist that 'all human beings' naturally share a common humanity, moral worth, inherent dignity and goodness, and compassionate mind capable of empathy 'that cannot bear to see the suffering of others'.²³ It is the responsibility of governments, he argued, to nurture these natural qualities. Rulers who engaged in oppression and persecution lost what he called the Mandate of Heaven, and they thereby forfeited the legitimacy needed to govern. In this regard—centuries before John Locke and

²⁰ Confucius, as cited in HG Creel, *Confucius: The Man and the Myth* (Day 1949) 150.

²¹ Confucius, *The Analects of Confucius* (Burton Watson (tr), Columbia UP 2009) 80.

²² Mo Tzu, *Basic Writings* (Burton Watson (tr), Columbia UP 1963) 39–49.

²³ As cited in Irene Bloom, 'Fundamental Institutions and Consensus Statements: Mencius Confucianism and Human Rights' in Win Theodore de Bary and Tu Weiming (eds), *Confucianism and Human Rights* (Columbia UP 1998) 101–102.

the Enlightenment in Europe—he argued that people possessed the right to overthrow a tyrant. In language that Chinese human rights activists have recalled with considerable pride ever since, Mencius declared: ‘The individual is of infinite value, institutions and conventions come next, and the person of the ruler is of least significance.’²⁴ The ancient philosopher Xunzi (c 312–230 BCE) went on to assert the same principle even more emphatically when he wrote: ‘In order to relieve anxiety and eradicate strife, nothing is as effective as the institution of corporate life based on a clear recognition of individual rights.’²⁵

4. ANCIENT INDIA

Significant early contributions emerged from ancient India as well. Between the end of the fourth and early-third century BCE, the beginnings of the classic Sanskrit treatise entitled *The Arthashastra* appeared. Although a number of authors eventually contributed to it over a period of time, it is largely attributed to Kautilya (c 370–283 BCE), also known as Chanakya, the Indian philosopher, economist, prime minister, and royal counsellor.²⁶ Based upon his own experiences helping to create and then sustain the Mauryan Empire that ruled over most of the Indian subcontinent, he sought to write about the theories, principles, and practices regarding actually governing a state. The book combines a discussion of some of the very pragmatic issues of exercising power in the face of adversity, with some of the moral teachings of the Hindu scriptures known as the Vedas. Parts of the text reflect brutal scheming and shocking ruthlessness, while other parts convey a deep concern for the well-being of the kingdom’s people, as well as compassion for those who suffer from abuse. Like Hammurabi, Kautilya argued that kings needed to be just and wise and that they had an obligation to rule their subjects fairly and benevolently, by promoting justice, guaranteeing property rights, and protecting certain kinds of rights for the poor, for women, for workers and servants, and for slaves. He devoted a large portion of his book to the subject of ‘Law and Justice’. It deals with civil and criminal law, stressing

²⁴ As cited in ‘The Evolution of Human Rights’ *United Nations Weekly Bulletin* (12 August 1946). Chinese students recited this statement in Tiananmen Square in 1989.

²⁵ As cited in UNESCO, *The Birthright of Man* (UNESCO 1969) 303. See also Zhuangzi, *Basic Writings* (Burton Watson (tr), Columbia UP 2003).

²⁶ For treatments of Kautilya, see Roger Boesche, *The First Great Political Realist: Kautilya and His Arthashastra* (Lexington Books 2003); VN Jha (ed), *Kautilya’s Arthashastra and Social Welfare* (Sahitya Akademi 2006); TN Ramaswamy, *Essentials of Indian Statecraft: Kautilya’s Arthashastra for Contemporary Readers* (Munshiram Manoharlal 2007); Patrick Olivelle, *King, Government, and Law in Ancient India: Kautilya’s Arthashastra* (OUP 2013).

the necessity of creating a ‘just and deserved’ penal system, establishing clear procedures for the use of evidence, and managing a transparent judiciary composed of qualified judges administering justice with integrity and impartiality. ‘Rule of Law [alone],’ he concluded, ‘can guarantee security of life and the welfare of the people.’²⁷

These thoughts very likely influenced Asoka (304–232 BCE), the third king of the Mauryan dynasty who governed a vast, powerful, and multi-ethnic Indian subcontinent for nearly forty years. He came to be known as Asoka the Great, and scholars and other observers often regard him as one of the exemplary rulers in world history. Brutal ruthlessness and military conquest for purposes of expanding the empire characterized his early career, but after viewing the widespread carnage and suffering that one particularly devastating war of his had caused, he expressed overwhelming remorse for what he had done and the injustice that he had caused. This profound experience led to a deep and dramatic conversion to Buddhism, with its emphasis on the sanctity of life ‘for all beings,’ nonviolence, and compassion. The transformation was so powerful that it convinced him to change both his personal and public life by renouncing war and devoting himself to the well-being of his subjects.²⁸

Over the course of his reign, Asoka launched many innovations and instituted many reforms to the existing administrative, judicial, and legal systems by issuing his famous Edicts of Asoka. Like Hammurabi, he wanted these laws to be widely known and given prominence. He thus inscribed them on highly visible boulders and especially on a series of huge, free-standing stone pillars averaging between forty and fifty feet in height. These are found at numerous locations throughout what are now modern India, Nepal, Pakistan, Afghanistan, and Bangladesh. The texts of the inscriptions focus on social and moral precepts, and convey the Buddhist concept of *dharma*, or duty and proper behaviour towards others. They also explicitly stress the necessity of being ‘completely law-abiding.’

The Edicts of Asoka address wide-ranging issues related to concepts of justice and human rights. They speak directly about compassion, social welfare, equal protection under the law regardless of political belief or caste, respect for all life, environmental protection, humanitarian assistance for those who suffer, humane treatment of employees and servants, ‘the hearing of petitions and the administration of justice,’ the banning of slavery, the right to be free from ‘harsh or cruel’ punishment, and the possibility of amnesty from the death penalty. One reads: ‘This edict has been inscribed here to remind the judicial officers in this city to try at all times to avoid unjust imprisonment or unjust torture.’²⁹ Despite Asoka’s deep personal commitment to Buddhism, the Edicts establish religious toleration for all sects and the

²⁷ Kautilya, *The Arthashastra* (LN Rangarajan (tr), Penguin 1987) 119.

²⁸ For studies of his life and contributions, see DC Ahir, *Asoka the Great* (BR Publishing 1995); Charles Allen, *Ashoka: The Search for India’s Lost Emperor* (Little Brown 2012). See also Harry Falk, *Asokan Sites and Artefacts* (von Zabern 2006).

²⁹ Kalinga Edict I, ‘Public Administration: The Promulgation of Morality and the Administration of Justice’ in NA Nikam and Richard McKeon (eds), *The Edicts of Asoka* (U Chicago Press 1978) 62.

right to freely practise one's own beliefs. In one well-known Edict, Asoka observes that he greatly values 'growth in the qualities essential to religion in men of all faiths'.³⁰ 'This growth', he continues,

may take many forms, but its root is in guarding one's speech to avoid extolling one's own faith and disparaging the faith of others improperly or, when the occasion is appropriate, immoderately. The faiths of others all deserve to be honored... By honoring them, one exalts one's own faith and at the same time performs a service to the faith of others.³¹

Asoka also proclaimed the critical importance of 'impartiality' in legal procedures and in punishments to implement the rule of law.³²

5. CLASSICAL GREECE AND ROME

Writing at approximately the same time as Mencius in China, some Greek philosophers began to consider the broader origins and meanings of law itself. They knew of the practical contributions that Cyrus the Great and others had made before them. But, their interest focused on the existence of an all-encompassing law of nature that they believed pervaded the entire world. This law, they argued, was eternal and universal and thus placed well above and beyond the specific context or needs of a particular state, the customs or rules of a specific society, or the will of a single law-maker. It governed every aspect of the universe and provided a framework for rights. Human conduct thus needed to be brought into harmony with this law of nature and to be judged according to it.³³

Plato (427–347 BCE), for example, wrote frequently about that which is 'natural', 'according to nature', and 'naturally just'. In his longest book, *The Laws*,³⁴ he argued that nature establishes normative standards for human behaviour and that universal legal and moral issues are so intertwined that they cannot be separated. The purpose of all law, he asserted, is to make it possible for people to act with reason, virtue, and justice

³⁰ Quoted in Micheline R. Ishay, *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present* (Routledge 2007) 29.

³¹ Rock Edict XII, 'Against Religious Intolerance and Discrimination within the Community' in Nikam and McKeon (n 29) 51–52.

³² Pillar Edict 4 in Nikam and McKeon (n 29) 60–61.

³³ Alan S. Rosenbaum (ed.), *The Philosophy of Human Rights: International Perspectives* (Greenwood Press 1980) 9–10.

³⁴ Plato, *The Laws* (Benjamin Jowett (tr), DigiReads 2009).

toward others.³⁵ Toward this end, and while serving as the voice of his teacher Socrates (469–399 BCE) in his political treatise *The Republic*, Plato championed just actions by the state and by individuals, to advance the common good and protect rights. In one well-known dialogue he asked: 'don't just actions produce justice, and unjust actions injustice?'³⁶ When discussing rights, in what would eventually become known as humanitarian law during times of warfare and armed conflict, Plato spoke out against enslaving enemies and killing innocents. To further protect civilians, he wrote, "Then let us lay it down as a law for our Guardians that they are neither to ravage land nor burn houses."³⁷ Moreover, and highly unusual at the time, Plato supported the idea of certain rights for women, arguing that 'the natures of men and women are akin', that they possess similar abilities, that they should receive the same kind of education, and that they should be entrusted with similar offices.³⁸

In his works entitled *Politics* and *Nicomachean Ethics*, Aristotle (384–322 BCE) insisted that the rule of law is necessary for good government and to safeguard the interests of individuals. He maintained that an intimate connection exists between justice and law. 'Natural justice' and 'natural right', according to Aristotle, came from 'natural law'. Manmade positive laws thus must conform to this law of nature, rather than contravene or subvert it. If the laws did not, and if what was just by the laws of men was not just by the law of nature, the higher authority of the latter could be appropriately invoked to disobey the former.³⁹ This position is perhaps best represented by the fictional character of Antigone, who, after being reproached by her king for refusing his specific command not to bury her slain brother, boldly asserts: 'Nor did I deem thine edicts of such force [t]hat they, a mortal's bidding, should override [u]nwritten laws, eternal in the heavens. Not of today or yesterday are these, [b]ut live from everlasting, and from whence [t]hey sprang, none knoweth.'⁴⁰

Stoic philosophers from ancient Greece and Rome extended these ideas by contending that the laws of nature provided rational, purposeful, and egalitarian principles governing the entire universe. They entailed not only physical rules, such as the succession of the seasons or the alternation between day and night, but also ethical rules, such as the obligation of individuals to respect one another as moral equals. Zeno of Citium (c 334–262 BCE), one of the founders of Stoicism, insisted

³⁵ See Huntington Cairns, 'Plato's Theory of Law' (1942) 56 *Harv L Rev* 359; V. Bradley Lewis, "Reason Striving to Become Law": Nature and Law in Plato's *Laws* (2009) 54 *Am J Juris* 67; Christopher Bobonich, *Plato's Laws: A Critical Guide* (CUP 2010).

³⁶ Plato, *The Republic* (Desmond Lee (tr), 2nd edn, Penguin 1987) 154.

³⁷ Plato, *The Republic* (n 36) 188.

³⁸ Plato, *The Republic* (n 36) 163–66.

³⁹ See Fred D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (OUP 1995); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (CUP 1998); Richard O. Brooks and James Bernard Murphy (eds), *Aristotle and Modern Law* (Ashgate 2003).

⁴⁰ Sophocles, *Antigone* (Robert Whitelaw (tr), Clarendon Press 1906) lns 453–58.

on the worth and dignity of each human life. His teachings stressed the relationship between natural law, virtue, and reason.

The great Roman statesman, orator, philosopher, and legal scholar Marcus Tullius Cicero (106–43 BCE) also focused his attention on natural law, which he believed imposed responsibilities for the well-being of others and had been founded ‘ages before any written law existed or any state had been established’.⁴¹ As he described in a frequently quoted passage from *The Republic*:

[True] law in the proper sense is right reason in harmony with nature. It is spread through the whole human community, unchanging and eternal, calling people to their duty by its commands and deterring them from wrong-doing by its prohibitions... This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. We cannot be exempted from this law by any decree of the Senate or the people... There will not be one such law in Rome and another in Athens, one now and another in the future, but all peoples at all times will be embraced by a single and eternal and unchangeable law.⁴²

The critical element in this law, he insisted, was a sense of justice based ‘in nature’. He famously and insightfully wrote in *The Laws*:

Most foolish of all is the belief that everything decreed by the institutions or laws of a particular country is just. *What if the laws are the laws of tyrants?* If the notorious Thirty [a group who abolished the law courts and instituted a reign of terror and murder] had wished to impose their laws on Athens... should those laws on that account be considered just? No more, in my opinion, should that law be considered just which our interrex passed [a bill creating unlimited powers], allowing the Dictator to execute with impunity any citizen he wished, even without trial. There is one, single, justice. It binds together human society and has been established by one, single law... Justice is completely non-existent if it is not derived from nature... [V]irtues are rooted in the fact that we are inclined by nature to have a regard for others; and that is the basis of justice.⁴³

Cicero returned to this theme in his last treatise, *On Duties*, concluding that natural law creates both responsibilities and rights for all people, as they seek justice and virtue in their relationships with each other.

Many of these theories in philosophy found their way into practice in Roman legal texts, including a remarkable body of law known as the *jus gentium*, or ‘law of peoples’ or ‘law of nations’, sometimes described as Rome’s greatest contribution to history. Based on the principles of natural law, it recognized certain universal duties and rights that extended to all human beings as members of the world community as a whole. Further developments occurred when the Emperor Justinian (c 482–565 CE) ordered the collection, compilation, and codification of the fundamental works

⁴¹ Quoted in Fernando Llano Alonso, ‘Natural Law: Autonomous or Heteronomous? The Thomistic Perspective’ in Francisco José Contreras (ed), *The Threads of Natural Law: Unravelling a Philosophical Tradition* (Springer 2013) 30.

⁴² Marcus Tullius Cicero, *The Republic and The Laws* (Niall Rudd (tr), OUP 1998) 68–69.

⁴³ Cicero, *The Republic and The Laws* (n 42) 111–12 [my emphasis]. See also Richard O Brooks (ed), *Cicero and Modern Law* (Ashgate 2009).

of laws, codes, decrees, case law, writings of the celebrated Roman jurist Gaius,⁴⁴ and other opinions and interpretations, as they had evolved up to that point. The result, known as the *Corpus Juris Civilis*, articulated principles and created an ordered system that still serve as the basis of civil law in many modern states, of canon law, and of the continued use of Latin in jurisprudence and legal procedures today. Indeed, one of its components, *The Institutes*, has been described as ‘the most influential law book ever written’.⁴⁵ One of its more notable provisions reads: ‘Justice is an unswerving and perpetual determination to acknowledge all men’s rights.’⁴⁶

6. THE MEDIEVAL PERIOD

The long-standing and constant struggle to find ways of using law to administer justice and protect those unable to protect themselves became even more critical after the fall of the Western Roman Empire. Once centralized authority that enforced a unified legal system collapsed, other legal systems and judicial procedures necessarily emerged to prevent arbitrary behaviour and abuse, creating a wide variety of written forms of law in various locations during the Early Medieval Period.⁴⁷ In the West, these include canon law, post-Roman Vulgar law, Frankish law, Norse (or Scandinavian) law, Anglo-Saxon common law, early Norman law, ‘Feudal’ law, Visigothic codes, Germanic law, as well as local laws from a variety of indigenous legal systems known as *Volksrecht*. Designed to protect the weak against the strong, these often contained provisions for kinship or family rights, property rights, women’s rights, the right to compensation for personal injury, and the right to a process of public litigation, among others.⁴⁸ A number of town charters, created at the urging of mercantile groups, also established areas known as ‘islands

⁴⁴ See WM Gordon and OF Robinson (trs), *The Institutes of Gaius* (Duckworth 1997), especially his commentary on civil law and natural law.

⁴⁵ ‘Introduction’ in Peter Birks and Grant McLeod (trs), *Justinian’s Institutes* (Cornell UP 1987) 18.

⁴⁶ Birks and MacLeod (n 45) 37. See also Andrew M Riggsby, *Roman Law and the Legal World of the Romans* (CUP 2010).

⁴⁷ Some sense of the richness of this law can be found at: Fordham University, ‘Medieval Legal History’ (*Internet Medieval Sourcebook*, 27 March 2007) <<http://www.fordham.edu/halsall/sbook-law.asp>> accessed 15 February 2013; ‘Medieval Documents: 400–1399’ (*The Avalon Project*) <http://avalon.law.yale.edu/subject_menus/medieval.asp> accessed 15 February 2013.

⁴⁸ See eg Mary P Richards and B Jane Stanfield, ‘Concepts of Anglo-Saxon Women in the Laws’ in Helen Damico and Alexandra Hennessey Olsen (eds), *New Readings on Women in Old English Literature* (Indiana UP 1990); Lisi Oliver, *The Body Legal in Barbarian Law* (U Toronto Press 2011).

of freedom', using the phrase '*Stadtluft Macht Frei*', which had some measure of self-determination from feudal lords.⁴⁹

In Constantinople, poised between Europe and Asia, the Eastern Roman Empire prospered, especially after Emperor Leo III (c 685–741 CE) issued the *Ecloga*, a concise but systematic compilation of Byzantine law. Although drawing heavily upon Justinian's legal texts, as well as regional customary law, he revised his legal code to be comprehensible and specifically to address the practical needs of daily life, all in the spirit 'of greater humanity' and justice and with the justification of spreading Christian principles. These new laws went further than previous efforts to establish the principle of equality before the law. The criminal law, for example, prescribed equal punishment for all individuals, regardless of their social class, and reduced the use of the death penalty. In civil law, the rights of women and children were enhanced and given much greater protection. Other provisions liberated serfs and elevated them to the status of free tenants. Moreover, in order to strengthen the rule of law by reducing corruption, the laws provided salaries for judicial officials and forbade them from accepting bribes.⁵⁰

A growing sophistication in ideas about the nature, meaning, and application of law began to visibly emerge in the late eleventh and early twelfth centuries, with the founding of European universities. They began to teach law for the first time as a distinct and systematized body of knowledge, described as 'legal science' or the 'science of law'. Secular and ecclesiastical legal decisions, rules, procedures, concepts, and enactments were objectively studied, systematically analysed, and carefully explained in terms of larger concepts and universal principles. Great attention was given to the study of many of the ancient legal texts discussed above, especially after the rediscovery in about 1080 of Justinian's compilation of Roman law. Knowledge and interpretation merged with understanding and then with practical application. Trained in the new legal science, successive generations of graduating students were employed in the chanceries and other governmental offices to serve as counsellors, judges, advocates, administrators, and legislative draftsmen. Universities thus increasingly accelerated the role of the scholar in shaping and developing law by creating and developing a legal profession that utilized education in order to conceptualize and give coherence and structure to the accumulating mass of legal norms and systems relating to justice and rights.⁵¹

A monumental development in this evolution occurred during the early thirteenth century in England. Feudal barons claimed King John and his oppressive regime had failed to meet his obligations to protect the rights and property of his

⁴⁹ I am indebted to William Farr for bringing this to my attention.

⁵⁰ See George Ostrogorsky, *History of the Byzantine State* (Rutgers UP 1969); Edwin Hanson Freshfield (tr), *A Manual of Later Roman Law: The Ecloga as Procheiron Mutata* (CUP 1927).

⁵¹ Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard UP 1983) provides the most authoritative study on this subject.

subjects under natural law. They rebelled and demanded that he accept restraints upon his abusive exercise of power by acknowledging the supremacy of the rule of law in the land, as the Magna Carta articulated in 1215. This 'Great Charter' remains one of the most renowned legal texts in history. In the original version and in several modified versions that followed, it recognized the principle that even royal government had limits, and certain liberties must be guaranteed. These liberties included the right to own and inherit property, the right to be free from excessive taxes, and the right of widows who owned property to opt not to remarry. The text also famously proclaimed: 'No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor we will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.'⁵² This clause has been widely viewed as providing an early guarantee of the legal concepts of the right to a trial by jury and the right to due process. More expansively, the text reads: '[T]o none will we deny... [or] delay right [or] justice.'⁵³

Shortly thereafter, and in a very similar way, the nobles of Hungary forced their king, Andrew II Arpad, to accept the Golden Bull (*Aranybulla*) of 1222. This document, so named for the hanging golden seal attached to royal pronouncements, was, and still is, frequently likened to the Magna Carta, in that it placed limits on the powers of the monarch. It codified certain rights for members of the nobility, including the inviolability of person and property. The text also established the right to disobey the king if he acted contrary to the law (*jus resistendi*).⁵⁴ Its significance in legal history is such that it has been called 'the first written constitution of Hungary'.⁵⁵ Further to the north, the king of Norway, Magnus Haakonsson, earned the epithet of the 'Law-Mender' by issuing his famous Magnus Lagaboters Landslov between 1274 and 1276. Drawing upon customary laws and a variety of provincial codes, he created a comprehensive legal text that defined the power of the government and protected the individual person by providing a certain measure of equality before the law and guaranteeing due process.⁵⁶

During the course of the same century, the highly influential Christian theologian and philosopher Thomas Aquinas (c 1225–74) wrote his magisterial *Summa Theologie*. A significant portion of this work is called 'Treatise on Law'. His attention focused on natural law, which he believed was divinely created by God and designed to be just and to make it possible for all individuals to realize their dignity and reach full development. He believed that when human beings act in accord with moral

⁵² Magna Carta, as cited in Boyd C Barrington, *The Magna Charta and Other Great Charters of England* (Campbell 1900) 239 [my emphasis].

⁵³ Barrington (n 52) 239.

⁵⁴ Elemér Hantos, *The Magna Carta of the English and of the Hungarian Constitution: A Comparative View of the Law and Institutions of the Early Middle Ages* (Lawbook Exchange 2005).

⁵⁵ See 'The Constitutional Court of Hungary' <<http://www.mkab.hu/constitutional-court>> accessed 15 February 2013.

⁵⁶ See Rory McTurk (ed), *A Companion to Old Norse-Icelandic Literature* (Wiley-Blackwell 2007).

behaviour and justice toward others, they live out of the love and the design of the divine for themselves and for others in a broader community. This brought Aquinas to postulate that a critical relationship existed between natural law and positive law. All human or positive laws, he insisted, must be judged by their conformity to the standards of natural law. 'Laws', he wrote, 'have binding force insofar as they have justice'.⁵⁷ Their purpose is 'to restrain the ability of the wicked to inflict harm'.⁵⁸ The fact that a manmade law existed, in other words, did not mean that it was necessarily just. An unjust law might have the 'appearance' of law in the way that it was created and enforced, but it might actually be a 'perversion of law and no longer a law' if it did not meet these standards.⁵⁹ Very much like Mencius in ancient China and philosophers in classical Greece and Rome, Aquinas reinforced the radical idea that if laws were not just, then people had the right to disobey them. This concept would lay a foundation for the subsequent development of theories of natural rights, and those who eventually campaigned on behalf of human rights against tyranny and oppression would seize upon it.

7. THE RENAISSANCE, REFORMATION, AND AGE OF EXPLORATION

Concepts about justice and rights, and laws that seek to transform them into practice, have always been tied to political, economic, social, scientific, religious, and intellectual developments throughout history. In this regard, as already demonstrated, widely diverse forces that unfolded in a variety of different places over the course of many centuries shaped the evolution of ideas about justice and the importance of individual autonomy and personal rights. As such, it can hardly be claimed that early ideas and even legal texts concerning human rights were somehow part of a Western monopoly. What the West did provide through time, however, were greater opportunities for these rights to receive much fuller consideration, articulation, public discussion, and eventual implementation. In Europe, the decline of feudalism, with its rigid hierarchy and monopolistic economy, for example, gradually made way for the rise of the free markets of capitalism and a middle class, thereby

⁵⁷ Aquinas, *A Summary of Philosophy* (Richard J Regan (ed), Hackett 2003) 191.

⁵⁸ Aquinas, *On Law, Morality, and Politics* (William P Baumgarth and Richard J Regan (eds), 2nd edn, Hackett 2002) 52.

⁵⁹ Aquinas, *Treatise on Law* (Richard Regan (tr), Hackett 2000) 44–47. See also John Goyette, Mark S Latkovic, and Richard S Myers (eds), *St. Thomas Aquinas & the Natural Law Tradition: Contemporary Perspectives* (Catholic University of America Press 2004).

strengthening the concept of an individual's right to own private property. This, in turn, led to the desire to transform personal economic rights into broader political and civil rights.

Such forces of movement in Europe could be seen during the fourteenth and fifteenth centuries, with the emergence of the Renaissance. A remarkable flourishing of literature, science, education, political and diplomatic innovations, the study and practice of law, and artistic expression, opened up new paths for self-awareness, personal expression, and freedom.

This can be seen in the art of Leonardo da Vinci (1452–1519), as well as the sculptures of Michelangelo (1475–1564). The latter's *David* powerfully conveys individuality, and *The Prisoners* visually demonstrates a passion to break away the marble encasing the figures in order to set them free to realize their potential as individual human beings. The courageous and pioneering writings of Christine de Pizan (c 1363–1434), the poet and author of *Book of the City of Ladies*, challenged the misogyny and gender stereotypes of her day, insisting that any discussion of natural law must include the rights of women as well as the rights of men.⁶⁰ Further articulation emerged from Giovanni Pico della Mirandola (c 1463–94), whose *Oration on the Dignity of Man* is frequently described as the 'Manifesto of the Renaissance', due to its forceful argument insisting on the worth of each person and the universal human capacity for self-transformation.⁶¹

Such thinking, which the invention of the printing press increasingly spread, was also reflected in ideas about individual belief and the right to freedom of religion. One of the early path breakers was John Wycliffe (c 1328–84), the English theologian, professor, and careful student of law, who challenged existing religious authorities and led the effort to translate the Bible into the vernacular language, in order that it might be more widely read. He went on to heavily influence the Czech priest, philosopher, and professor, Jan Hus (c 1372–1415), who became an outspoken martyr on behalf of religious freedom. 'I would ask you to love one another', he said just before being burned at the stake for heresy, 'not to let the good be suppressed by force and to give every person his rights'.⁶²

These challenges inspired others, and by the sixteenth century, the movement was known as the Reformation. Protestants protested (hence their name) existing and entrenched clerical authorities and their practices. They rejected the exclusive power that the institutional Church and the Pope (as its leader) claimed. Instead, they emphasized personal spiritual emancipation, individual conscience and responsibility, greater tolerance, and freedom of religious belief and opinion.

⁶⁰ Christine de Pizan, *The Book of the City of Ladies* (Rosalind Brown-Grant (tr), Penguin 2000).

⁶¹ Pico della Mirandola, *Oration on the Dignity of Man* (Francesco Borghesi, Michael Papio, and Massimo Riva (eds), CUP 2012).

⁶² As cited in H Gordon Skilling, *Charter 77 and Human Rights in Czechoslovakia* (Allen & Unwin 1981) epigraph.

Importantly, they engaged in serious political dissent in order to realize their objectives. Humanistic philosophers, such as Erasmus of Rotterdam (c 1466–1536) further stressed the relationship between this kind of faith and the political, economic, and social reform that promoted individual human dignity. 'The doctrine of Christ', he wrote, 'casts aside no age, no sex, no fortune, or position in life. It keeps no one at a distance.'⁶³ All these thoughts contributed to a considerable expansion of discourse about justice, equality, freedom, individual rights, and the use of law to protect them.

One of the particularly significant developments in this expansion of the rule of law, and one that eventually had long-term implications for international human rights, was visible in the efforts to apply legal principles of protection beyond the confines of domestic jurisdiction, to a broader world. The fact that it was precisely during the late-fifteenth and early-sixteenth centuries that the 'Age of Exploration' began greatly enhanced this process. New technological inventions, including navigational instruments and the caravel sailing ship, made it possible for Europeans to explore Africa, the Americas, Asia, and Oceania as never before in history. In these areas, they encountered a vast array of peoples different from themselves and discovered a much larger world than they had ever imagined. Yet, discovery quickly turned to conquest. Seeking to build their overseas empires, Europeans engaged in ruthless massacres and exploitation. The massive suffering of indigenous peoples that resulted became so horrifying that it provoked outrage. Such abuses raised deeply troubling questions about the meaning of 'humanity' as a whole and whether justice, rights, and the rule of law ought to be universally applied to non-white and non-Christian peoples who lived continents and oceans away. This prompted the noted Dominican theologian and law professor of the sixteenth century, Francisco de Vitoria (c 1483–1546), to go beyond mere abstraction to focus his attention on very specific abuses and very real victims, by rejecting notions of subhuman 'backward' and 'inferior' races and speaking out against the Spanish government's brutal treatment of the Aztecs and the Incas. He argued on behalf of what he called a 'republic of the whole world' (*res publica totius orbis*) and of the necessity of developing a universal *jus gentium*, or 'law of nations', to protect the rights of all peoples.⁶⁴

These efforts to develop and apply the law to concrete issues internationally encouraged other legal experts to do the same, including those who turned their attention to a particularly controversial subject of state policy not known for restraint: warfare. Building on the writings of Aquinas and Vitoria, a number of

⁶³ Cited in Mark Kishlansky, Patrick Geary, and Patricia O'Brien, *Civilization in the West* (2nd edn, HarperCollins 1995) 392.

⁶⁴ James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Lawbook Exchange 2000). On the historic problem of race, see Paul Gordon Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (2nd edn, Westview Press 1996). See also John M Headley, *The Europeanization of the World: On the Origins of Human Rights and Democracy* (Princeton UP 2008).

leading jurists insisted that humans must apply standards of justice to all activity, including war. Alberico Gentili (1552–1608), the regius professor of civil law at Oxford University, was one of these. His contemporary, Francisco Suárez (1548–1617), the Spanish jurist, Jesuit priest, and prominent Scholastic philosopher who lay some of the first foundations of international law, was another. The teachings and writings of Suárez stressed that all human promulgation of positive law must be based on the natural law that governs all creation. Since all men are created equal, he argued, this precluded any patriarchal theories of government or any exaggerated claims by kings of divine rights that gave them unlimited power to do whatever they wished, including how they launched or fought wars. To restrain such behaviour, and to protect the rights of innocents in the midst of death and devastation, Suárez stressed the necessity of establishing international legal norms for justice, both in and of warfare. Each of these ideas contributed to an emerging body of thought that would become known as just war theory, entailing the justice of war (*jus ad bellum*) and justice in war (*jus in bello*).⁶⁵

8. THE ENLIGHTENMENT AND ITS THREE REVOLUTIONS

The concept of natural law and its relationship to natural rights and manmade law received enormous attention during the course of the broad and transforming movement known as the Enlightenment, or Age of Reason. By the middle of the seventeenth century, revolutionary discoveries in the sciences expanded knowledge to unimagined levels, dramatically changing ways of thinking which tradition, superstition, dogma, and ignorance had previously circumscribed. This created a secular intellectual milieu which believed that human reason could discover rational and universal laws. If laws of physics, mathematics, biology, and medicine could be discovered in nature, it was asked, then why not laws of government and human behaviour that might help reform politics, society, and law as well?

Such thinking is clearly seen in the writings of Hugo de Groot (Grotius) (1583–1645), the brilliant Dutch legal scholar and diplomat who often is credited as being the 'Father of Modern International Law'. In his seminal book, *On the Law of War and Peace*, he declared that natural law—both physical and moral—exists independently

⁶⁵ For more discussion, see Paul Gordon Lauren, Gordon A Craig, and Alexander L George, *Force and Statecraft: Diplomatic Challenges of Our Time* (5th edn, OUP 2014) ch 12. See also David Kennedy, 'Primitive Legal Scholarship' (1986) 27 *Harvard International Law Journal* 1–98.

of any political authority. This law, he wrote, stands above all human-created governments and institutions and serves as a measuring rod against which to judge any regime. It also provides all people with certain natural rights of protection and just and equal treatment, which they ought to be free to enjoy without regard to any religious or civil status.⁶⁶ Interestingly, Huang Zongxi (1610–95) was expressing similar ideas during exactly the same century in China. Huang Zongxi was a reformist political theorist and Confucian philosopher, sometimes described as the ‘Father of Chinese Enlightenment’, who wrote that attention needed to shift from the exclusive rights of rulers to the rights of people and that the rule of law should protect these individuals.⁶⁷

Grotius insisted that states had the responsibility to protect these rights in times of war. The international application of these principles became particularly pressing as emerging sovereign nation-states become recklessly powerful and willing to engage in unrestrained violence during the exhausting religious wars of his time. As Grotius looked at the world of anarchy around him, he saw:

a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.⁶⁸

The only way to break this vicious pattern, Grotius declared, was to create a broader order, or system, based on legal norms that respected the ‘laws of nations’, established specific criteria for ‘just war’, and honoured the ‘natural rights’ of individual human beings.⁶⁹ Samuel Pufendorf (1632–94), the famous German jurist and historian, endorsed and amplified Grotius’s thoughts on just war. Of particular importance, in *On the Law of Nature and of Nations* and in *On the Duty of Man and Citizen According to Natural Law*, which served as basic texts in universities throughout the Enlightenment, Pufendorf emphasized that natural law and natural rights, and their protection in international law (especially in times of war), must not be confined to the West or to Christendom, but seen as a common bond between all nations and peoples, as a part of a larger and universal humanity.⁷⁰ Such ideas helped to establish the foundation on which international humanitarian law eventually would be built.

⁶⁶ See Tuck (n 39); Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (CUP 1996).

⁶⁷ Lynn Struve, ‘Huang Zongxi in Context: A Reappraisal of His Major Writings’ (1988) 47 *J Asian Stud* 474; Peter Zarrow, ‘Citizenship and Human Rights in Early Twentieth Century Chinese Thought’ in de Bary and Weiming (n 28).

⁶⁸ As quoted in William Cullen Dennis, ‘The Diplomatic Correspondence Leading Up to the War: Part I’ (1915) 9 *AJIL* 402, 476.

⁶⁹ Dennis (n 68) 476.

⁷⁰ Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (James Tully (ed), CUP 1991).

Throughout history, laws and legal thought have profoundly influenced the course of human events, and, reciprocally at other times, human events have acted to profoundly shape laws and legal thought. These dynamics and the interactions between them were revealed with striking clarity during the seventeenth century, with the dramatic upheavals surrounding the English Revolution. In 1628, Parliament passed the Petition of Right, subsequently described as ‘one of England’s most famous constitutional documents.’⁷¹ It spoke of ‘diverse Rights and Liberties’, reaffirmed due process and the rule of law, and enacted prohibitions against seizing private property, imprisoning without cause, quartering troops on citizens, and imposing martial law in peacetime. With such direct challenges to the absolutist claims and practices of the monarch, deep divisions exploded into violence. Civil war began in 1642, pitting the supporters of Parliament against those of the Crown, and launching a period of more than forty years of warfare and turmoil, including the trial for treason and beheading of a king, assassination attempts, the emergence of a military dictatorship, several changes of government, and popular uprisings. One radical group, known as the ‘Levellers’, called for guarantees of the ‘native rights’ to life, property, equal protection under the law, the election of representatives, and freedom of religion. In 1679, Parliament passed the Habeas Corpus Act, providing protection against arbitrary arrest by strengthening the right of a prisoner under detention to be brought before a court of law in person, in order that the court might examine the legality of his case. This milestone in English constitutional history remains on the statute books to this day.

Then, another monumental landmark in the rule of law and the history of civil and political rights occurred when Parliamentary leaders passed the 1689 Bill of Rights. This act fundamentally transformed the nature of the English, Scottish, and Irish government into that of a constitutional monarchy, by rejecting claims about the divine right of kings, elevating Parliament above the Crown, and subjecting royal power to strict limits under the law. Each of these elements stood in marked contrast to the ‘absolute’ monarchs who dominated the rest of Europe. The bill was clearly founded on the conviction that individuals possessed certain natural rights and the rule of law needed to protect these rights. The bill’s provisions thus addressed the right to own property, the right to petition the monarch without fear of retribution, the right to be free from royal interference with the law and the courts, the right to free elections for representative government, the right of freedom of speech in Parliament, the right to a trial by jury, and the right to be free from excessive bail or ‘cruel and unusual’ punishment, among others—all in the name of ‘ancient’ and ‘undoubted’ natural rights, and all designed to protect individuals

⁷¹ Jess Stoddart Flemion, ‘The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory’ (1973) 45 *J Mod Hist* 193, 193. See also John Hostettler, *Sir Edward Coke: A Force for Freedom* (Universal Law Publishing 2006).

'from the violation of their rights'.⁷² The Bill of Rights would go on to have global influence. It is still in effect today.

The momentous events of the English Revolution, in turn, influenced ideas about law, natural law, and natural rights—particularly those of the most influential philosopher, John Locke (1632–1704). First through his *A Letter Concerning Toleration* of 1689, with its forceful argument for freedom of religion and conscience, and then through his seminal *Second Treatise of Government* of 1690, Locke stressed that all humans possessed certain natural rights prior to the existence of any organized societies. Importantly, this concept applied not just to those in Europe, but also to 'common humanity' and 'governments all through the world'.⁷³ Every individual, he wrote, irrespective of the particular political, socioeconomic, or cultural conditions under which he lives, possesses:

a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature equally with every other man or number of men in the world and has by nature a power not only to preserve his property—that is his life, liberty, and estate—against the injuries and attempts of other men, but to judge and punish the breaches of that law in others.⁷⁴

From this premise, it followed that people had formed societies and established governments in order to protect these rights—not to surrender them. Governments thus derived their authority and legitimacy from the consent of the governed. If government leaders failed in fulfilling this responsibility and broke their side of the contract, said Locke (while sounding very much like Mencius in ancient China, Aristotle in ancient Greece, Cicero in ancient Rome, and Aquinas in the Medieval period), the government leaders thereby absolved people from further obedience and gave them the right to resist. Such a vision possessed enormous power, and Locke's ideas, along with those developed throughout the earlier centuries, influenced many of the ideas of those that followed him. They still inspire those who challenge entrenched privilege and abuse and struggle on behalf of human rights.

During the eighteenth century, leading Enlightenment intellectuals, known as the *philosophes*, were inspired by these ideas and encouraged by the dynamic temper of the time, and therefore sought to promote even further the connection between rights and the rule of law. In this regard, the fact that in French the word *droit* covers both meanings, *law* and *right*, assisted them. These luminaries included Charles de Secondat, Baron de Montesquieu (1689–1755), who wrote in his *Spirit of Laws* that political freedom and basic human rights cannot be protected, unless the power of government is divided among separate branches; Voltaire (1694–1778),

⁷² English Bill of Rights 1689. See also Bernard Schwartz, *The Roots of Freedom: A Constitutional History of England* (Hill & Wang 1967); Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685–1720* (Penguin 2008); Steven Pincus, 1688: *The First Modern Revolution* (Yale UP 2011).

⁷³ John Locke, *Two Treatises of Government* (Hafner Library of Classics 1947) 124, 128.

⁷⁴ John Locke, *Two Treatises* (n 73) 163.

who insisted in his *Treatise on Toleration* that natural law established the right of all people to freely practise their religion, without fear of persecution; and Jean-Jacques Rousseau (1712–78), who argued in his *Social Contract: Principles of Political Right* for the necessity of people joining together in civil society to create laws and legal institutions that promoted justice and protected individual rights. They were joined by Denis Diderot (1713–84), who stressed that natural rights are universal and exist for all human beings at all times and in all places, in the entry on 'Natural Law' in his *Encyclopedia*;⁷⁵ and Immanuel Kant (1724–1804), who emphasized the ethical responsibility to defend the dignity and worth of all people and declared in one of his most celebrated statements: 'Because a... community widely prevails among the Earth's peoples, a transgression of rights in one place in the world is felt everywhere'.⁷⁶ In his hard-hitting *On Crimes and Punishments*, Cesare Beccaria (1738–94) defended the right of all to be free from the then-common practices of prisoner abuse, brutal torture, and the death penalty. Many other notable writers of the period could be mentioned, as well.⁷⁷ What these individuals had in common was a desire to expand liberty, the right to enjoy freedom of religion and expression, limited constitutional government, the right to be free from torture, the right to be free from slavery and exploitation, the right to life and to property, the right to justice, and the right to be protected by the rule of law.

The thoughts of these great philosophers of the Enlightenment began to create visions of a future that would influence the growth of civil society and shape the course of events. They had taken ideas about law, natural law, and natural rights that had evolved over the course of many centuries and from different places, built upon them, and then crafted them so that they addressed particular problems. Those who believed that their rights were being denied or flagrantly abused, and who sought protection against the arbitrary exercise of power as well as justification for resistance to oppression, now came to readily invoke these ideas. In fact, these challenges emerged in the first place in reaction to the abject failure of European monarchs and the hereditary elite to modify the political despotism, privileged class positions, economic exploitation, social suppression, torture, bigotry, intolerance, and absence of the rule of the law that characterized the era, and therefore their failure to respect the principles of freedom and equality inherent in natural law and natural rights philosophy. As one scholar has aptly described it: 'Absolutism prompted man to claim rights precisely because it denied them'.⁷⁸

⁷⁵ Denis Diderot, *Encyclopédie ou Dictionnaire Raisonné des Sciences, des Arts et des métiers* (Sociétés Typographiques 1781).

⁷⁶ Immanuel Kant, *Perpetual Peace and Other Essays* (Ted Humphrey (tr), Hackett 1983) 121.

⁷⁷ See Lynn Hunt, *Inventing Human Rights: A History* (WW Norton 2008).

⁷⁸ Maurice Cranston, as cited in Burns Weston, 'Human Rights' in Richard Pierre Claude and Burns H Weston (eds), *Human Rights in the World Community: Issues and Action* (2nd edn, U Pennsylvania Press 1992) 16.

Such claims reached a deafening crescendo among the leaders of the American Revolution, many of whom had received careful schooling in the philosophy and political theory of the Enlightenment. Even prior to the outbreak of violence, the First Continental Congress, meeting in Philadelphia in 1774, enacted its own Declaration of Rights, invoking entitlement to 'life, liberty, and property' for all men.⁷⁹ Lest these rights be restricted, and the expression 'men' be considered exclusive, Abigail Adams (1744–1818) warned her husband that, when drafting a 'new code of laws,' he should:

[R]emember the ladies and be more generous to them than your ancestors. Do not put such unlimited power in the hands of the husbands. Remember, all men would be tyrants if they could. If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation.⁸⁰

Explosions of discontent, and the outbreak of actual war between the colonists and British forces in 1775, produced further discourse and articulations of law, natural law, and natural rights. The Virginia Declaration of Rights, for example, announced that 'all men are by nature equally free and independent, and have certain inherent rights.'⁸¹ Thomas Jefferson (1743–1826) followed this Declaration within days by giving eloquent expression to the philosophy of the time; the Declaration of Independence of 4 July 1776, referred to 'the laws of Nature and Nature's God'. He stated his case with these dramatic words:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of those ends, it is the right of the people to alter or abolish it, and to institute new Government.⁸²

Despite the eloquence and inspiration of this language, it took several years of struggle in warfare, the loss of life, bitter sacrifices, and foreign military assistance, before the colonists secured victory against the British and thus gained their independence. But the ability to fight and to destroy with the force of arms is not the same as the ability to create a new government with the force of argument and ideas. It took years of intense debate to resolve differences of opinion and interests. The

⁷⁹ 'Declarations and Resolves of the First Continental Congress' (*The Avalon Project*) <http://avalon.law.yale.edu/18th_century/resolves.asp> accessed 15 February 2013.

⁸⁰ '31 March 1776: Abigail Adams to John Adams' (*The Liz Library*) <<http://www.thelizlibrary.org/suffrage/abigail.htm>> accessed 15 February 2013.

⁸¹ 'Virginia Bill of Rights: June 1776' in Benjamin Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, vol 2 (Franklin 1972) 1908–09.

⁸² 'Declaration of Independence, 4 July 1776' (*The Avalon Project*) <http://avalon.law.yale.edu/18th_century/declare.asp> accessed 15 February 2013.

desire 'to form a more perfect Union'⁸³ eventually resulted in the US Constitution of 1787, which became the supreme law of the land. It established the world's first modern democratic republic, based upon the consent of the governed, the federal separation of powers coupled with a system of checks and balances, the placement of judicial authority in the hands of the Supreme Court and in such lesser courts as Congress might establish, and the legal recognition of the civil right to a trial by jury and the political rights to vote and to hold public office.

The Constitution marked a monumental achievement for the new United States, but for many the text did not guarantee enough legal protection of the 'natural rights' for which they had fought in the American Revolution. They thus devoted considerable efforts to changing this situation as soon as possible by amending the Constitution itself. The result took the form of the first ten amendments, collectively known as the Bill of Rights, which offered guarantees under law of the rights of individual citizens against threats from the two most likely sources of abuse: the excessive power of a strong national government, and (importantly and uniquely for the time) the tyranny of the majority—or, as James Madison (1751–1817), who drafted the amendments, so aptly described it, the 'impulse of passion, or of interest, adverse to the rights of other citizens.'⁸⁴ These rights included freedom of religion, of speech, and of the press; the right to petition and to peacefully assemble; freedom from unreasonable searches and seizures and from cruel and unusual punishments; due process and equal protection under the rule of law; and the right to a speedy and public trial by jury, among others. This legal text, written and ratified in the eighteenth century, would remain at the core of the most critical and controversial issues to be raised in the nation's subsequent history. To this day, it remains the greatest foundation, bulwark, and symbol of rights in the United States.⁸⁵

The final upheaval of this period to contribute fundamentally to the foundations of justice and human rights came with the French Revolution. The successes of the American Revolution in challenging a monarch, in overthrowing the established order, and in creating a new government with legal protections for certain rights, offered encouragement, but internal pressures and abuses suffered under a despotic king and the hereditary elite of privilege and power within France provided the immediate causes of the outbreak of violence. Within mere weeks of the beginning of the revolution in 1789, deputies in the National Assembly adopted the landmark Declaration of the Rights of Man and Citizen. Drawing upon the ideas of the Enlightenment, their own *philosophes*, and the US Declaration of Independence,

⁸³ 'Constitution of the United States: Preamble' (*The Avalon Project*) <http://avalon.law.yale.edu/18th_century/preamble.asp> accessed 15 February 2013.

⁸⁴ James Madison, 'Federalist Paper No 10' in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New American Library 1961) 78.

⁸⁵ See Jack Rakove, *Declaring Rights: A Brief History with Documents* (Bedford/St. Martins 1997); Leonard W Levy, *Origins of the Bill of Rights* (Yale UP 2001).

the deputies forcefully asserted that '[m]en are born and remain free and equal in rights'; that these rights are universal, valid for all times and places, and 'natural and imprescriptible'; and that they include 'liberty, property, security, and resistance to oppression'.⁸⁶ They wrote the text in such a way as to give more precise definition to these broad concepts, by specifically delineating the political right to vote and the civil rights of equality before the law, protection against arbitrary arrest and punishment, the presumption of innocence until proven guilty, freedom of personal opinions and religious beliefs, freedom of expression, and the right to possess property. By making this declaration an integral part of their new constitution, the deputies transformed their vision of natural law and natural rights into the positive law of the land. They thereby established that the legitimacy of their government no longer derived from the will of the monarch and the traditional order of the *ancien régime*, based upon inherited privilege and hierarchy, but instead from the guarantee of individual rights. The eventual impact of this sweeping foundational document on France and on other countries and peoples in the world struggling against abuse and oppression was profound. The historian Lord Acton described it as 'a single confused page... that outweighed libraries and was stronger than all of the armies of Napoleon'.⁸⁷ Indeed, a more recent authority concludes that this particular legal text 'remains to this day the classic formulation of the inviolable rights of the individual vis-à-vis the state'.⁸⁸

The Declaration of the Rights of Man and Citizen immediately began to inspire other visions and efforts. New articles were added to the French constitution, for example, specifying legal guarantees for political and civil rights, including ones for freedom of thought and worship that protected Protestants and Jews who previously had been persecuted. Others abolished slavery within the borders of France. Still other provisions mandated public relief for the poor and free public education—items completely unknown in any other constitution of the time, and ones that would inspire the development of economic and social rights. The Declaration additionally inspired a self-educated playwright and political activist, Olympe de Gouges (1748–93) to issue her own Declaration of the Rights of Woman and Citizen, a pioneering document in the history of the struggle for women's rights. In that document, she called for legal reforms, insisting that 'woman is born free and lives equal to man in her rights'.⁸⁹ She added, passionately:

⁸⁶ 'Declaration of the Rights of Man—1789' (*The Avalon Project*) <http://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 15 February 2013. See also Stéphane Rials (ed), *La Déclaration des Droits de l'Homme et du Citoyen* (Hachette 1988); Lynn Hunt (ed), *The French Revolution and Human Rights: A Brief Documentary History* (Bedford/St. Martins 1996).

⁸⁷ Lord Acton, as cited in Robertson and Merrills (n 2) 4.

⁸⁸ Frede Castberg, 'Natural Law and Human Rights: An Idea-Historical Survey' in Asbjørn Eide and August Schou (eds), *International Protection of Human Rights* (Almqvist & Wiksell 1968) 19. See also Stephen Marks, 'From the "Single Confused Page"' (1998) 20 *Hum Rts Q* 459.

⁸⁹ Olympe de Gouges, 'Declaration of the Rights of Woman, 1791' <<http://www.library.csi.cuny.edu/dept/americanstudies/lavender/decwom2.html>> accessed 15 February 2013.

Women, wake up; the tocsin of reason sounds throughout the universe; recognize your rights...! Women, when will you cease to be blind? Whatever the barriers set up against you, it is in your power to overcome them; you only have to want it!⁹⁰

These voices and developments on behalf of justice and rights struck powerful chords. They challenged past thinking and practices, ignited passion, and generated the commitment to push even further among others. Mary Wollstonecraft (1759–97), to illustrate, became determined to advocate for gender equity in her book, *A Vindication of the Rights of Woman*.⁹¹ Thomas Spence (1750–1814) followed with his *The Rights of Infants*.⁹² Many others forcefully spoke out on behalf of the victims that racial slavery and the slave trade were utterly abusing. As one group of Quakers poignantly wrote:

We conjure you, as you love Liberty, to extend its influence, and investigate its import; examine your Declaration of Rights, and see if you can find in it a *term* which conveys the idea of *human* merchandise; examine your hearts, and see if you can find a spark of brotherhood for men who *deal* in men. To defend your own liberties is noble, but to befriend the friendless is Godlike; complete then your Revolution by demanding Commerce to be just, that Africa may bless you as well as Europe.⁹³

Unwilling to wait for gradual reform on this matter, black slaves in Saint Domingue (now Haiti) launched a violent revolt against their white masters in order to obtain their rights.

The impassioned and visionary pamphleteer, Thomas Paine (1737–1809), published the first part of his sensational and provocative *Rights of Man* in 1791.⁹⁴ Here, he drew upon the theories of natural law and natural rights, as well as his own personal involvement with both the American and the French Revolutions, and spoke boldly about political, civil, and economic rights. This brought him to the critical point of recognizing the inextricable connection between rights on the one hand, and the responsibility to create and uphold just law on the other. 'A Declaration of Rights is,' he wrote, 'by reciprocity, a Declaration of Duties also. Whatever is my right as a man is also the right of another; and it becomes my duty to guarantee as well as to possess'.⁹⁵

⁹⁰ 'Déclaration des Droits de la Femme et de la Citoyenne, 1791' in Olympe de Gouges, *Œuvres* (Mercure de France 1986) 99–112. See also Françoise Thébaud, 'La Première Féministe Militante' [2000] *Historia* 62.

⁹¹ Mary Wollstonecraft, *A Vindication of the Rights of Woman* (first published 1792).

⁹² Thomas Spence, *The Rights of Infants* (first published 1796).

⁹³ London Revolution Society (2 September 1792), as cited in George Mellor, *British Imperial Trusteeship: 1783–1850* (Faber & Faber 1951) 22 (emphasis in original).

⁹⁴ Thomas Paine, *Rights of Man* (Penguin 1984).

⁹⁵ Paine (n 94) 114.

9. PERSPECTIVES AND ASSESSMENTS

By the end of the eighteenth century, an impressive array of early legal texts and thoughts, evolving from a long and rich history, thus addressed a wide range of fundamental issues of justice and human rights. To appreciate the significance of this development, one must remember that almost all of them emerged out of traditional, hierarchical, patriarchal, and pre-industrial societies ruled by imperial or authoritarian regimes. Up to this point in history, abuse had largely characterized the long-standing pattern. Here, the few ruled the many, and stark stratification separated the strong from the weak. Men dominated women and expected them 'to know their proper place'. Human bondage and exploitation in slavery and serfdom were widely practised. Discrimination and persecution on the basis of race, of class or caste, of belief, or of ethnicity, were common. Existing authorities expected obedience rather than claims to individual rights. Moreover, virtually all governments regarded how they treated those under their control as a matter exclusively within their own sovereign, domestic jurisdiction. In these settings, advocacy for justice and rights was more often than not regarded as synonymous with subversion and thus as something that could be expected to provoke determined resistance.

The fact that laws and ideas of justice and human rights would emerge out of such fiercely constrained settings provides an indication of the extraordinarily widespread appeal and the power to transform ways of thinking and acting that characterized them.⁹⁶ In the face of oppression, abuse, and resistance, outspoken and courageous men and women were able to incorporate elements of justice and rights into legal texts and a variety of published writings, from books and pamphlets to declarations and collections of letters. By the end of the eighteenth century, they had contributed the specific expressions of 'natural law', 'natural rights', 'natural justice', 'the law of nations', 'the rights of man', 'the law of peoples', 'the rights of mankind', 'the laws of justice', 'humanity's laws', 'moral laws', 'the rights of humanity', and 'human rights', among others. Although closely connected, these phrases, and the concepts they represented, were not always equivalent or defined in exactly the same way as we might today. Instead, they marked beginning efforts, impulses, habits of the heart, and embryonic attempts to express ideas about justice and rights and, if possible, to incorporate them into legal texts close to home whenever they could. They were not fully developed doctrines, precisely articulated definitions, or carefully crafted international laws. At this early stage in their evolution, they hardly could be expected to do otherwise. They would evolve, expand, and become more sophisticated only through time and within their own historical contexts.

⁹⁶ This theme is developed throughout Lauren, *The Evolution of International Human Rights* (n 1).

Nevertheless, and despite their limitations, they taught significant lessons and laid essential foundations for developments that eventually would result in international human rights law. One of these was an appreciation for the absolutely critical importance of the rule of law itself. Those who spoke out early in history on behalf of justice and human rights came to understand, often through frustrating experience and painful persecution, that whatever visions they held would likely remain dreams and never become reality, unless they created legal guarantees. Only in this way, they reasoned, could they check the arbitrary exercise of power. Only in this way, they concluded, could victims of abuse be transformed from objects of pity into actual subjects of law. This explains why so much effort was expended in drafting, negotiating, promulgating, legislating, or otherwise enacting legal texts.

But those who championed justice and human rights in the past also came to realize that the existence of written guarantees in legal texts alone is never sufficient to protect the rights of the abused. As Confucius and Cicero pointed out centuries ago, the mere existence of laws does not necessarily mean that they serve justice. There are just laws, and there are unjust laws. This fact requires that great care be taken to ensure that the norms they enshrine are of the former. In addition, laws in and of themselves hold little practical value, unless they are actually enforced. The 'force of law' possesses meaning only if there is genuine enforcement. Centuries of historical experience has demonstrated that there are always those unwilling to share power, those with vested interests in special privileges, and those with prejudices against others, as well as leaders claiming that they can act entirely as they wish, without restraint. These individuals will strongly resist, will challenge the law, or will seek to subvert it in order to exclude, deny, and prevent others from legal protection of their rights. The struggles in implementing the Bill of Rights in the US Constitution itself, in the face of slavery, segregation, lynching, gender discrimination, and limits on the freedom of speech, to name only a few, provide more than enough evidence to demonstrate the magnitude of this kind of challenge.

The realization of the responsibility for enforcing just laws provided yet another major contribution to the evolution of justice and human rights, by revealing the clear connection between duties and rights. Law establishes responsibilities owed to others in society. As Thomas Paine noted so well in his *Rights of Man*, in order to enjoy the rule of law's protection of one's rights, one must enforce the rule of that law on behalf of others. But if those duties remain unperformed or unfilled, then others have a right to claim them. It is for this reason that the ideas about human duties, or what one is due to do, lead quite naturally to ideas of human rights, or what is due to one. This explains why, after looking back across historical time and place, Mahatma Gandhi, in a more recent century, concluded: "The true source of rights is duty."⁹⁷

⁹⁷ Mohandas Gandhi, as cited in UNESCO, *The Birthright of Man* (n 30) 24.

Finally, the early ideas of natural law and natural rights provided a necessary foundation for the whole development of subsequent international human rights law. If one accepts that all human beings can claim certain rights simply as a result of being human, then it does not matter where, when, or under what form of government these individuals live. This is precisely the foundational concept, taken from legal texts and thoughts, which had evolved up to the end of the eighteenth century, and seized upon by those delegates who wrote the monumental Universal Declaration of Human Rights (UDHR)—a document that virtually every international human rights treaty that would follow cites. Indeed, they consciously chose the very language of natural law and natural rights from the different historical times, cultures, and places around the world that this chapter has discussed. This led the drafters to declare in the preface that the provisions are designed ‘for all peoples and all nations’ and in the first article that, ‘All human beings are born free and equal in dignity and rights.’⁹⁸ To emphasize the point, they began a number of provisions with exactly the same simple—but extremely powerful—word: ‘Everyone.’ They selected many specific provisions directly from earlier historical legal texts. Moreover, the authors drew upon a particularly important lesson they had learned from history, by declaring in the text ‘that human rights should be protected by the rule of law.’⁹⁹ It is for this reason that the declaration explicitly states: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law.’¹⁰⁰

Together, these critical contributions from the past lay the foundation for the evolution of international human rights law that would follow. They established an essential beginning. Those who worked on behalf of justice and human rights in previous centuries understood that they needed to take the first step, by developing ideas and principles and then applying them in the only place they could: in law and practice close to home. But, they held a vision that, when the opportunity arose, the broader rule of law and the protection of human rights should be extended beyond their own immediate circumstances and applied to the world at large. How they worked to achieve this goal will be seen in the many cases discussed throughout this volume.

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⁹⁹ UDHR, preamble.

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